Internal Revenue Service

memorandum

CC:TL-N-8433-90
Br4:MEHara

date: AUG 10 1990

to: District Counsel, San Diego W:SD

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [redacted] Docket No. [redacted]

This is in response to your July 6, 1990 request for formal tax litigation advice in the above-entitled matter. You seek our advice regarding if and when tax returns are deemed filed where copies of the alleged previously filed returns are delivered by the taxpayer to a special agent, who then mails the copies to the service center for filing as of an earlier date.

ISSUE

Whether, and if so, when, a tax return is deemed filed where a copy of the signed tax return is hand delivered by the taxpayer to a special agent conducting a criminal investigation, who after determining that no return has actually been filed, mails the copy to the service center for filing as of a certain earlier date.

CONCLUSION

Under the facts of this case, the tax return is deemed filed when the copy of the allegedly previously filed return was received by the Fresno Service Center on [redacted]

FACTS

Taxpayers [redacted] residents of California for the years in question, did not file tax returns for the years [redacted] through [redacted] During tax preparation time, [redacted] would usually assemble information concerning her wages, taxes paid, and interest income. She relied upon her husband to prepare the returns. She signed the returns timely and assumed that her husband mailed the returns. In fact, [redacted] did not mail in the returns in question.

In [redacted] Revenue Officer William Nicholson contacted [redacted] regarding her failure to file federal income tax returns for the tax years [redacted] and [redacted] under the name [redacted] "[redacted]" is her former

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married name. [redacted] explained that she had filed joint tax returns with her husband, [redacted]. Revenue Officer Nicholson requested copies of the returns for those years. On [redacted], [redacted] hand delivered copies of the [redacted], [redacted], and [redacted] to Revenue Officer Nicholson, and shortly thereafter [redacted] hand delivered a copy of the [redacted] income tax return to Officer Nicholson. Based upon the copies of the returns and [redacted]'s explanation of the filings, Revenue Officer Nicholson closed his investigation on [redacted]

The [redacted] did not ask Officer Nicholson to file the copies, nor did they ask him not to file the copies. Officer Nicholson thought he was following procedures by relying on the explanation and the copies provided to assume that the returns were filed. The standard operating procedure for closing files in such investigations at the time was to destroy the closed files within six months.

In [redacted], Special Agent Anthony Falcone and Revenue Agent Al Ginsburg commenced an investigation of [redacted]. They met with [redacted] in [redacted], at which time Anthony Falcone informed her that the Service had no record of her having filed returns for [redacted] through [redacted]. [redacted] stated that she had provided Revenue Officer Nicholson with copies of previously filed joint income tax returns for [redacted] through [redacted]. Agent Falcone asked [redacted] for copies of the [redacted] through [redacted] income tax returns.

On [redacted], [redacted], her attorney [redacted], William Nicholson and Al Ginsburg met, at which time [redacted] handed over copies of the [redacted], [redacted], [redacted] and [redacted] tax returns to Mr. Falcone and Mr. Ginsburg. Neither [redacted] nor [redacted] instructed Special Agent Falcone either to file or not to file the copies with the service center. [redacted] stated that the information on the returns was accurate to the best of her knowledge.

Special Agent Falcone stamped the copies of the returns "Received by Criminal Investigation Division, Santa Anna, [redacted]" Mr. Falcone consulted District Counsel Attorney, Patrick McGinnis, to determine what to do with the copies of the returns. Mr. McGinnis recommended that the returns be mailed to the service center for filing as of the closing date of the Taxpayer Delinquency Investigation conducted by Officer Nicholson. ([redacted]).

Special Agent Falcone mailed the [redacted], [redacted], [redacted] and [redacted] returns to the Fresno Service Center with instructions to accept them as filed as of [redacted]. Fresno received all the copies of the returns on [redacted]. Fresno posted all the returns as filed [redacted], except for the [redacted] return. The [redacted] return for some unexplained reason was posted as filed [redacted].

Neither Mr. Falcone, Mr. Ginsburg, Mr. McGinnis, nor any other party notified the [redacted] that the copies received were being filed with the service center.

[redacted] filed a Tax Court petition, Docket No. [redacted], in which he admitted "[p]etitioner was married to [redacted] . . . during the entire tax years ending [redacted], [redacted], [redacted] and [redacted]. Petitioner and his wife filed a joint return on the cash receipts and disbursements basis for each such year."

[redacted] filed a separate Tax Court petition, Docket No. [redacted], and at the close of trial, [redacted] conceded that the statute of limitations had not expired, whether returns were filed or not. Petitioner's current position for purposes of computation of the amount of deficiency in dispute is that the returns were never filed and do not constitute joint returns.

DISCUSSION

Intent to File

I.R.C. § 6013(d) provides that "if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several." Consequently, under I.R.C. § 6013(d), the government may recover 100% of the tax deficiency owed from a spouse. California, the residence of the [redacted] for the years in question, is a community property state, and income earned by each spouse is considered community property by operation of law. Each spouse is considered to have a one-half interest in the income earned by the other. Consequently, the gross income of each spouse includes one-half the community income. *Poe v. Seaborn*, 282 U.S. 101, 118 (1930); Rev. Rul. 87-13, 1987-1 C.B. 20. If the [redacted] are deemed not to have filed joint returns, each spouse would only be liable for [redacted]% of the tax deficiency. Consequently, whether the government may be able to recover [redacted]% or [redacted]% of the deficiency depends on whether the joint returns in question were filed.

The petitioner argues that she is not jointly and severally liable for the deficiency owed because her copies were never filed by her and do not constitute joint returns. It is our opinion, however, that under the facts of this case the joint returns in question should be considered filed joint returns because: (1) petitioner intended to file returns, (2) the petitioner intended to file joint returns, (3) the copies were affirmatively represented as copies of the previously filed joint returns, and (4) the returns were received by the appropriate service center.

I.R.C. § 66 does not define the word "filed." The statutory requirements for filing returns, however, are contained in I.R.C. § 6091. In general, I.R.C. § 6091(b)(1)(A) provides that a return of persons other than corporations shall be made to the Secretary:

(i) in the internal revenue district in which is located the legal residence or principal place of business of the person making the return, or
(ii) at a service center serving the internal revenue district referred to in clause (i) as the Secretary by regulations may designate.

It is our opinion that a return is filed: (1) when it is received by the location designated by the code and regulations, *O'Bryan Bros. v. Commissioner*, 127 F.2d 645 (6th Cir. 1942), *cert. denied*, 317 U.S. 647, and, (2) although there is no direct authority in the Internal Revenue Code or in case law, in a non I.R.C. § 6020 situation, a return is filed where a taxpayer intends to file a return, as reflected by his objective manifestations. *See Espinoza v. Commissioner*, 78 T.C. 412, 418 (1982).

In *Espinoza*, the taxpayer filed fraudulent returns for the years 1971 through 1974. In 1976, at a meeting in connection with an audit, the taxpayer's attorney handed the revenue agent copies of documents labeled as "amended returns." After the conference, the agent returned to his office, and the documents were stamped as "Received" by the Audit Division. The amended returns were not forwarded to the service center and were never processed as returns. In 1981, the Commissioner issued a notice of deficiency for the years 1971 through 1974, and the taxpayer filed a motion for summary judgment in the Tax Court asserting that the proposed deficiencies were barred by the statute of limitations. In opposition, the government asserted that the notice was timely under I.R.C. § 6501(c) since the original returns were fraudulent and since the purported amended returns were never in fact "filed" so as to commence the running of any period of limitations. The court denied the taxpayer's motion for summary judgment, stating that the record in the case left considerable doubt whether the amended returns were filed, contending that the evidence indicated that the returns were never filed. Significantly, the court stated, the taxpayers "failure to pay the additional taxes raises a question as to whether he *intended* for the amended returns to be filed." *Id.* at 422. (Emphasis added). *Espinoza* thus raises the inference that a taxpayer must intend to file a return before a return is considered filed.

Here the facts and circumstances indicate the taxpayer intended that the returns be filed. She assisted in the preparation of the returns and signed them. She relied on her husband to mail the returns to the service center. She represented to two examination teams that she had filed the return and handed copies of the returns to representatives of the Internal Revenue Service. Petitioner's actions in dealing with the agents demonstrated either that she implicitly intended to file the returns, or that she implicitly ratified her intent to file the returns. The actual filing with the service center is consistent with this intent.

The government could also assert that petitioner is equitably estopped from arguing that she never intended to file her joint returns. Equitable estoppel will prevent a

taxpayer from arguing that a joint return, previously represented by the taxpayer as valid and relied upon by the Service to its detriment, is no longer valid. *United States v. Wynshaw*, 697 F.2d 85, 87 (2d Cir. 1983)(taxpayer estopped from asserting that she did not sign a filed joint return and that the return was not authorized). As set forth in *Piarulle v. Commissioner*, 80 T.C. 1035, 1044 (1983), for equitable estoppel to apply:

> "(1) there must be false representation or wrongful misleading silence; (2) the error must originate in a statement of fact, not in opinion or statement of law; (3) the one claiming the benefit of estoppel must not know the true facts; and (4) that same person must be adversely affected by the acts or statements of the one against whom an estoppel is claimed."
> *Id.* at 1044.

[redacted] told Revenue Officer Nicholson in [redacted] that she had filed a return and had delivered signed copies to him. In reliance upon the representations that the [redacted] through [redacted] returns had been filed, Revenue Officer Nicholson closed his investigation. This prejudiced the Service, which otherwise could have commenced an investigation earlier and avoided the subsequent loss of witness records and memory, and the loss of bank records. In [redacted], [redacted] delivered copies of the same returns to Special Agent Falcone and Revenue Agent Ginsburg, representing that the returns in question had been filed and that all income to the best of her knowledge was reported on these joint income tax returns. The Service relied upon these representations to its detriment. The Service applied the lower tax rate of married couples filing jointly to compute [redacted]'s tax liability. The Service allowed the deductions claimed on those returns and even determined no tax deficiency in 1984 in reliance upon the deductions claimed and allowed on those returns. These facts present a strong case for application of equitable estoppel preventing [redacted] from asserting that she never intended to file the returns in question.

The facts and circumstances in this case also indicates the petitioner and her husband intended to elect joint status and file a joint return. "Whether a return is a joint return is a question of fact and is primarily a question of intent." *Shea v. Commissioner*, 780 F.2d 561, 567 (6th Cir. 1986), *citing Sharwell v. Commissioner*, 419 F.2d 1057, 1059 (6th Cir. 1969); *Martin v. United States*, 411 F.2d 1164, 1168 (8th Cir. 1969). It is clear under the facts of this case that the taxpayer intended to file the return and elect joint status. She "knew the joint returns were being prepared and took an active role in their preparation." *Sharwell* at 1059. She signed the returns, the returns reflected her income and deductions, she ratified their correctness to two separate examination teams, and she has not filed a separate return. She apparently presumed the joint returns were filed and made representations two separate examination teams that they were filed. Her husband admits in his petition that joint returns for the years in question were filed. Therefore, the petitioner should be held to

her original returns and should not be allowed to revoke her prior election of joint status, especially since a notice of deficiency has been issued.

Finally, Treas. Reg. § 1.6091-2(c) states "[w]henever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed in accordance with the instructions." The instructions to Form 1040 on "Where to File" for the years in question provide that the return should be "mailed to the Internal Revenue Center where [the taxpayer] live[s]." In this case, the returns were forwarded by Special Agent Falcone to the Fresno Service Center and were filed by Service employees. And as discussed above, the Service could also argue that [redacted] is equitably estopped from asserting that returns in question were never filed.[1] Consequently, the joint returns should be considered filed because the petitioner intended to file the joint returns, they were received by the appropriate service center, and the petitioner is equitably estopped from asserting either that she never intended to file the returns or that the returns were never actually filed.

Time of Filing

Absent the operation of "timely mailing, timely filing" rule of I.R.C. § 7502, an item is considered filed upon its receipt by the proper service center. In *United States v. Lombardo*, 241 U.S. 73, 76 (1916), the court held "a paper is filed when it is delivered to the proper official and by him received and filed." And as the court noted in *Phinney v. Bank of the Southwest National Association*, 335 F.2d 266, 268 (5th Cir. 1964), "[t]he filing of a paper takes place upon the delivery of it to the officer at his office." *See also King v. United States*, 495 F. Supp. 334, 336 (D. Neb. 1980)("in regard to taxes, the general rule is that a filing occurs on actual physical delivery of a document to the I.R.S.").

Treas. Reg. § 1.6091-2(d)(1) provides that returns "filed by hand carrying shall be filed with the district director." Because delivery to a revenue agent does not constitute delivery to a district director, *Espinoza v. Commissioner*, 78 T.C. 412, 418 (1982), it is our opinion that the joint returns in question were filed when they were received by the service center, not when they were received by Mr. Nicholson.

O'Bryan Bros. v. Commissioner, 127 F.2d 645 (6th Cir. 1942), *cert. denied*, 317 U.S. 647; *Ardbern Co. Ltd.*, 41 B.T.A. 910 (1940); and *Espinoza* provides additional support

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[1] One troubling aspect of the *Piarulle* formulation of the elements of equitable estoppel is the requirement that the one claiming the benefits of estoppel must not know the true facts. 80 T.C. at 1044. It may be argued that the Service should have known that [redacted] did not file the return and that Revenue Officer Nicholson could have easily checked to discover whether a return had been filed. In *Piarulle*, the taxpayer was not estopped because the court found that the Service's reliance was not reasonable. *Id.* at 1044-45.

for the proposition that a return is filed when the return was received by the service center where it should have been mailed, not when it is received by a revenue agent. In *O'Bryan*, the taxpayer, a Tennessee corporation, delivered its tax return to an internal revenue agent on June 15, 1934. The return was received by the Collector of Internal Revenue for the District of Tennessee on August 7, 1934. The taxpayer argued that the return should be considered filed on the date of its receipt by the revenue agent in charge. The government argued that the return was filed on August 7, 1934, the date it was received by the Collector of Internal Revenue for the District of Tennessee. The Sixth Circuit affirmed the Tax Court's finding that the return was filed on August 7, 1934. *O'Bryan* thus stands for the proposition that a return is deemed filed on the date when the return is received by the appropriate service center.

In *Ardbern*, the taxpayer, a foreign corporation, tendered its tax returns to a Service conferee. In holding that the statute of limitations did not bar assessment because the return had not been properly filed, the court stated "[t]here is no statutory authority for the making or filing of a return with the Commissioner of Internal Revenue, nor is it his duty or the duty of any conferee or employee of the Bureau, other than the collector designated in the statute, to accept returns." *Id.* at 919. Accordingly, under *Ardbern*, the returns were not filed when received by Officer Nicholson as Service officials are under no duty under case law to file the return at the proper service center for the taxpayer.[2]

Finally, as noted by the Tax Court in *Espinoza*, "courts have frequently ruled "hand delivery of a return to an IRS agent does not constitute the filing of a return." *Id.* at 420; *Harrod v. Commissioner*, T.C. Memo. 1961-300; *W. H. Hill Co. v. Commissioner*, 64 F.2d 506 (6th Cir. 1933); *Kotovich v. Commissioner*, T.C. Memo. 1959-177.

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[2] *See O'Harren v. Commissioner*, T.C. Memo 1990-332, in which the court rejected petitioners' argument that the respondent had an obligation to forward any misdirected mail received by a service center (Form 872T) to the proper office. *Id.* at p. 6.

Under I.R.M. 48(13)1-69 § 313.2 revenue agents are instructed to are instructed upon receiving a delinquent return to check it for completeness and forward it to the Examination Support and Processing Unit. Similarly, Special Agents are instructed under I.R.M. § 4562.33, upon receiving a delinquent return to note when it was received and forward it to the appropriate service center. However, the internal revenue manual is directory and does not constitute the force of law. *Foxman v. Reinson*, 625 F.2d 429, 432 (2d Cir. 1980); *Einhorn v. Dewitt*, 618 F.2d 347, 350 (5th Cir. 1980); *First Federal Savings and Loan Assn. of Pittsburg v. Goldman*, 644 F.Supp. 101 (W.D. Pa. 1986). Care should be taken to preserve the case law that provides that the Service does not impliedly accept the responsibility or duty to file a return for the taxpayer. Therefore, as set forth in the case law discussed above, filing occurs when a return is received by the appropriate service center.

In summary, it is our opinion that the returns were filed on [redacted], when they were received by the Fresno Service Center.[3]

Please contact Michael E. Hara at FTS 566-3305 if you have any questions or need further assistance in this matter.

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[3] Although not raised by the taxpayer, there is a potential issue raised by the lack of an original signature on the returns filed at the Fresno Service Center, because those returns were copies. I.R.C. § 6061. Rev. Proc. 67-38, 1967-2 C.B. 669, § 4.03 provides that "all signatures on forms to be filled with the District Director of Internal Revenue must be original signatures, affixed subsequent to the reproduction process." However, the fact that the documents were signed at one time under penalties of perjury may satisfy the statutory requirements of I.R.C. § 6061. In *Florsheim Bros. Drygoods Co. v. United States*, 280 U.S. 453 (1930), the Supreme Court set forth a four part test to determine whether a document is a sufficient return for statute of limitation purposes: First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of tax law; and fourth, the taxpayer must execute the return under the penalties of perjury. Here, the returns filed meet all of the tests, as the returns were signed at one time under the penalties of perjury. See *Beard v. Commissioner*, 82 T.C. 766, 778 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986).

Also, the fact that an individual's signature appears on a return is prima facie evidence that she actually signed it. I.R.C. § 6064, Treas. Reg. § 301.6064-1. In addition, under F.R.E. § 1003, a duplicate is admissible to the same extent as the original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Finally, there are numerous cases that hold the taxpayers to a joint return, even when one of the spouses fails to sign the return. *Estate of Campbell v. Commissioner*, 56 T.C. 1 (1971); *Krock v. Commissioner*, T.C. Memo. 1983-551; *Riportella v. Commissioner*, T.C. Memo 1981-463 (joint return upheld even where neither spouse signed joint return). As stated in Saltzman, *IRS Practice and Procedure*, ¶ 4.8 fn. 35.1 (1990 Cum. Supp.) "[t]he critical factor is intent to file a joint return, not the signature or its absence, and this intent may be inferred from evidence that the nonsigning spouse intended to continue filing a joint return, as the spouse had done in the past," *citing Martin v. United States*, 411 F.2d 1164, 1168 (8th Cir. 1969); *Estate of Upshaw*, 416 F.2d 737, 742-43, (7th Cir. 1969); *cert. denied*, 397 U.S. 962 (1970).